



November 17, 2016

The Congressional Review Act (CRA)

Overview

What is the CRA? The CRA (codified at 5 U.S.C. §§801-808) is an oversight tool Congress can use to overturn certain agency actions. The CRA requires agencies to report the issuance of “rules” to Congress and provides Congress with special procedures, in the form of a joint resolution of disapproval, under which to consider legislation to overturn rules. The CRA was enacted as part of the Small Business Regulatory Enforcement Fairness Act in 1996. If a CRA joint resolution of disapproval is approved by both houses and signed by the President, or if Congress overrides a presidential veto, the rule at issue cannot go into effect or continue in effect.

What is a rule under the CRA? The CRA adopts the broadest definition of a “rule” contained in the Administrative Procedure Act (APA), with three exceptions.

Definition of a “Rule” Under the CRA

The APA definition of a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” The CRA *excludes* three kinds of actions from this definition of a rule:

1. rules of particular applicability;
2. any rule relating to agency management and personnel; and
3. any rule of agency organization, procedure, or practice that does not substantially affect the rights and obligations of non-agency parties.

5 U.S.C. §804(3); see 5 U.S.C. §551.

The CRA applies to major rules, non-major rules, final rules, and interim final rules. Additionally, the definition is sufficiently broad that it may define as “rules” agency actions that are not subject to traditional notice-and-comment rulemaking, such as guidance documents and policy memoranda.

Submission of Rules to Congress

What submission is required? Under the CRA, rules must be submitted to both houses of Congress and the Government Accountability Office (GAO). The CRA does not specify when an agency must submit a rule. However, since a rule cannot become effective until after it is submitted, agencies generally submit rules around the time the rule is published.

How do I know if a rule was submitted? Notice of each chamber’s receipt of a rule submitted under the CRA is published in the “Executive Communications” section of

the *Congressional Record*. GAO also maintains the “Federal Rules Database,” which tracks submission of rules.

What happens if an agency does not submit a rule? An agency may decline to submit an action to Congress and GAO if it does not consider the action to be a rule under the CRA. However, the agency may not have the last word on the applicability of the CRA. In the past, when Members of Congress have thought an agency action is a rule under the CRA, they have asked GAO for a formal opinion as to whether the action satisfies the CRA definition of a rule such that the agency would be required to comply with the CRA submission procedures. GAO has issued 11 opinions of this type at the request of Members of Congress.

Although the CRA states that a joint resolution of disapproval can be introduced only after a rule is submitted and received by Congress, Members have had varying degrees of success in getting resolutions recognized as privileged under the CRA even if the agency never submitted the rule to Congress. It appears that in the past the Senate has considered the publication in the *Congressional Record* of the official GAO opinions discussed above as the trigger date for the initiation period to introduce a disapproval resolution and deemed such resolutions to qualify for the expedited Senate procedures.

CRA Joint Resolution of Disapproval Procedures

What does a joint resolution of disapproval look like? The CRA stipulates the text for a joint resolution of disapproval.

Required Text of a CRA Joint Resolution of Disapproval

“That Congress disapproves the rule submitted by the [agency] relating to [name of the rule], and such rule shall have no force or effect.”

Each CRA joint resolution of disapproval can be used only to invalidate one final rule in its entirety.

How is a joint resolution of disapproval filed? A CRA joint resolution of disapproval is introduced in largely the same way as any other bill. However, the joint resolution must be introduced within a specific time frame: during a 60-days-of-continuous-session period beginning on the day the rule is received by Congress. As discussed above, if the rule is not submitted, the Senate *may* consider the date a GAO opinion finding the action to be a rule is published in the *Congressional Record* as the beginning of the period. Days-of-continuous-session periods count every calendar

day, including weekends and holidays, and exclude only days that either chamber (or both) is gone for more than three days—that is, pursuant to an adjournment resolution.

Are there expedited procedures for a CRA joint resolution of disapproval in the House? There are no expedited procedures for initial House consideration. The joint resolution would likely be considered under the terms of a special rule reported by the Rules Committee.

Are there expedited procedures for a CRA joint resolution of disapproval in the Senate? Yes. When a CRA joint disapproval resolution meets certain criteria, it cannot be filibustered in the Senate. To be eligible for these “fast track” procedures, the Senate must act on a disapproval resolution during a 60-days-of-Senate-session period, which begins on the date the rule has been submitted to Congress and published in the *Federal Register* (if applicable).

Committee Consideration. When introduced, a CRA disapproval resolution is referred to committee like other legislation. A committee may choose to report a CRA disapproval resolution, but it may not amend it. After the expiration of a 20-calendar day period beginning after the rule has been submitted to Congress and published in the *Federal Register* (if applicable), a Senate committee can be discharged of the further consideration of a resolution disapproving the rule. This discharge occurs when a discharge petition is submitted on the Senate floor signed by at least 30 Senators.

Senate Floor Consideration. Once a CRA joint resolution of disapproval is reported or discharged from Senate committee, a non-debatable motion to proceed to consider the joint disapproval resolution can then be made by any Senator. If called up, the measure would be subject to up to 10 hours of debate before being voted upon. No amendments are permitted.

Does a CRA joint resolution of disapproval have to be filed in each chamber? No. The CRA does not require that “companion” joint resolutions of disapproval be introduced in both the House and Senate. However, if the House acts first on a House-sponsored CRA joint resolution of disapproval, the Senate can consider the House measure only under the “fast track” procedures described above if it first takes up its own resolution of disapproval. If there is no Senate companion bill, reaching the House-received measure would effectively require unanimous consent. Therefore, a House sponsor who wants the chance to have a resolution be considered by the Senate under the expedited CRA procedures should ensure that a companion Senate disapproval resolution is introduced during the 60-day introduction period.

What happens if Congress adjourns before the CRA introduction or action periods end? If, within 60 session (Senate) or legislative (House) days of session after a rule is submitted, Congress adjourns its session *sine die*, the periods to introduce and act on a disapproval resolution described above “reset” in their entirety in the next session of Congress, beginning in each chamber on the 15th day of

session after Congress reconvenes. This “reset” provision is intended to ensure that Congress will have the full periods contemplated by the act to disapprove a rule regardless of when it is received.

Effect of a CRA Resolution of Disapproval

What happens when a CRA joint resolution of disapproval is enacted? A rule that is the subject of an enacted CRA joint resolution of disapproval “shall be treated as though such rule had never taken effect.”

Can the agency promulgate the same rule again? In most circumstances, the agency may not promulgate the same rule again. A rule subject to an enacted CRA joint resolution of disapproval “may not be reissued in substantially the same form, and a new rule that is substantially the same ... may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution.” However, the CRA does not define the scope of “substantially the same,” what criteria should be considered, or who should make such a determination.

Is judicial review available? The CRA states, “No determination, finding, action, or omission under this chapter shall be subject to judicial review.” Two federal appeals courts and several federal district courts have examined this section. The majority view, adopted by most of these courts, interprets the provision as unambiguously prohibiting judicial review of *any* question arising under the CRA. Under this view, courts do not have the power to void rules based on an agency’s noncompliance with the CRA. The minority view, adopted by one district court, concludes that it prevents review of *Congress’s* determinations, findings, actions, or omissions made under the CRA. Under this minority view, a reviewing court has power to determine if an agency rule should have been submitted to Congress under the CRA.

Previous Uses of the CRA

How many rules have been overturned using the CRA? The CRA has been used to overturn a rule one time. In November 2000, the Clinton Administration’s Occupational Safety and Health Administration issued a rule on ergonomics standards. The full 60-day congressional consideration period did not elapse before the second session of the 106th Congress adjourned, and therefore the initiation and action periods reset in the new Congress. On March 20, 2001, President George W. Bush signed into law P.L. 107-5 to overturn the rule.

Alissa M. Dolan, adolan@crs.loc.gov, 7-8433
 Maeve P. Carey, mcarey@crs.loc.gov, 7-7775
 Christopher M. Davis, cmdavis@crs.loc.gov, 7-0656

IF10023